

IN THE COURT OF APPEAL
APPELLATE JURISDICTION

CRIMINAL APPEAL NO: AAU 0107 OF 2011
(High Court Case No: HAC 047/10)

BETWEEN : **NIKASIO TUPOU** *Applicant*

AND : **THE STATE** *Respondent*

BEFORE : **HON. MR. JUSTICE DANIEL GOUNDAR**

COUNSEL : Ms N. Nawasaitoga for the Applicant
Mr L. Fotofili for the State

Date of Hearing : 22 November 2013
Date of Ruling : 29 November 2013

RULING

- [1] The applicant was convicted of murder of his de-facto wife after a trial in the High Court at Suva. He was sentenced to life imprisonment with a non-parole period of 16 years.
- [2] This is an application for leave pursuant to section 21(1) of the Court of Appeal Act. The proposed grounds of appeal against conviction are:
1. The Learned Trial Judge erred in law and in fact when he misdirected the assessors on the law of provocation.
 2. The Learned Trial Judge erred in law and in fact when he speculated and addressed the assessors to consider that the alleged offending was committed in revenge or by way of retaliation when there was no evidence to support this contention resulting in substantial miscarriage of justice.
 3. The Learned Trial Judge erred in law and in fact when he speculated and addressed the assessors to consider that the alleged offending was

committed due to the Appellant's jealousy when there was no evidence to support this contention resulting in substantial miscarriage of justice.

[3] It is clear that the grounds of appeal against conviction complain of a number of misdirections in the trial judge's summing-up on the law and fact in relation to the defence of provocation.

[4] At trial, the applicant did not dispute that he killed the deceased. His defence was that he acted under provocation when he walked into his home and saw his wife in a 'compromising position' with another man. He acted on the spur of moment and hacked his wife to death with a cane knife while the wife's male companion managed to escape. Later the applicant attempted to commit suicide but was not successful.

[5] In Fiji, provocation is a statutory defence. It is defined by section 242 of the Crimes Decree as follows:-

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.

(2) The term "provocation" means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when—

(a) done to an ordinary person; or

(b) done in the presence of an ordinary person to another person —

(i) who is under his or her immediate care; or

(ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person -

to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

[6] The trial judge's directions on provocation were as follows:

18. Oxford Advanced Learners Dictionary New 7th Edition defines provocation as “the act of doing or saying something deliberately to make somebody angry or upset; something that is done or said to cause this.”

19. The English Lexicon defines provocation as “being provoked to commit a crime or to carry out an action which you had not intended”.

[7] Counsel for the applicant submits that the above directions constituted misdirections as they did not conform to the statutory definition of provocation.

[8] Following the above directions, the trial judge gave further directions on provocation as follows:-

20. Provocation is a word that has a special meaning in the context of the criminal law. It means a wrongful act done towards the Accused of such a nature as to be likely to deprive the Accused of the power of self-control and to induce him to commit murder. It is for the State to prove that the Accused was not provoked to kill the deceased; it is not for the Accused to prove that he was.

21. The law says that where a person unlawfully kills another in the heat of passion caused by sudden provocation and before there is time for his passion to cool he should be found not guilty of murder but guilty of manslaughter.

[9] Counsel for the applicant submits that the above directions were inadequate in a sense that it lacked direction on the reasonable man test that has been applied to provocation in the English cases. In *R v. Duffy* [1949] 1 ALLER 932 Devlin J said:

Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually caused in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.

[10] The question of whether the reasonable man test is part of the law in Fiji was considered by the Supreme Court in *Pravin Ram v. The State*, CAV001 of 2011. The Supreme Court rejected the proposition that the reasonable test applied in Fiji, and at paragraph [43] of the judgment the court stated the test in Fiji was ‘whether the accused caused the death of the deceased in the heat of passion caused by sudden

provocation having reacted to a wrongful act or insult of the deceased which was of such a nature as to be likely to deprive an ordinary person of the power of self control and to induce him or her to commit an assault before there is time for cooling of the passion so aroused'.

[11] Recently, the Supreme Court in *Isoa Codrokadroka v. The State* CAV7 of 2013 at [17] confirmed that 'when considering the gravity of the provocation offered, the standard of self control by which the accused should be judged is that of a person of the accused's age and gender exercising the ordinary powers of self control to be expected of an ordinary person of that age and gender'. In the present case, the trial judge makes no reference to the ordinary man test in his directions on provocation.

[12] Paragraph [22] of the summing-up deals with the evidence as it related to the provocation relied on by the applicant. The applicant takes objection to the following question posed to the assessors by the trial judge:

Was it a stabbing and slashing committed in revenge or by way of retaliation?

[13] The trial judge then gave further direction:

But if you decide that the accused had no heat of passion as he committed this because of his jealousy then he can be convicted of murder.

[14] Counsel for the applicant submits that there was no evidential basis to direct that the applicant acted in revenge or out of jealousy. Counsel's submission is that by directing on the above facts, the trial judge virtually diminished the defence of provocation as it related to the applicant's case.

[15] At this stage, it is not appropriate to make any conclusions on the grounds of appeal against conviction. All I have to be satisfied is that the grounds are arguable before the Full Court. I am satisfied that they are.

[16] Only one ground has been advanced against sentence as follows:

That the Learned Trial Judge erred in principle in ordering 16 years of non-parole period by not taking into account the fact that the Appellant himself was a victim of deceit, betrayal and distrust by the deceased.

[17] It is clear from the sentencing remarks of the trial judge that provocation was not considered in fixing of the non-parole period. Whether provocation is relevant in sentencing, and in particular, in the fixing of a non-parole period is an arguable point. The applicant has satisfied the threshold for leave to appeal against sentence.

Result

[18] Leave is granted to appeal against conviction and sentence.



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Daniel Goundar
Justice of Appeal

Solicitors:

Office of the Legal Aid Commission for the Applicant
Office of the Director of Public Prosecutions for the State